Mid – Atlantic Regional Council
Dedicated to Enhancing the Utilization of Small Business

The FAR Ethics and Compliance Rules

Small Business Impacts and Implications

WESTON SOLUTIONS
The Trusted Integrator for Sustainable Solutions

The Trusted Integrator for Sustainable Solutions

Agenda

- Some History
- Outline of New Far Rules
- Impact on Small Business
- Implementation Considerations/ Strategies
- Discussion/Questions

History

- In the 1980's, GAO found that agencies were not investigating allegations of wrongdoing.
- "Packard Commission" recommends contractors be encouraged to implement voluntary integrity programs.
- ENRON, Katrina, Iraq Reconstruction, created an impression that existing voluntary efforts were not effective in controlling contractor "misconduct"

FAR Subpart 3.10

- Contractor Code of Business Ethics and Conduct (FAR 52.203-13)
- Directs the use of FAR cl. 52.203-13 in contracts >$5M, and with a performance period of >120 days
- Requires “flow down” where above criteria applies to subcontracts

Elements of 52.203-13 ("Lite" - Small Business)

- Written Code of Business Ethics and Conduct
- Must be provided to all employees (working on the contract)

- Exercise due diligence to prevent and detect criminal conduct and promote a culture that encourages ethical conduct and commitment to compliance
- ***Flow down, if required, and assure implementation***

Elements of 52.203-13
("Hi Test" – Large Business)

All the elements for SB, plus:

An on-going business ethics awareness and compliance program

The ***program***, must include:

1. Communications & education on ethics/compliance issues for employees, and
2. "As appropriate", same for agents/***subcontractors***, plus
3. An ***internal control and monitoring system***

Application of the Final Rule

	Code of Business Ethics and Conduct	Business Ethics Awareness and Compliance Programs	Internal Control System	Mandatory Disclosure/ Suspension and Debarment
Contractors With Commercial Item Contracts	Yes, with Contracts Containing FAR 52.203-13	Not Required but Recommended by the FAR	Not Required but Recommended by the FAR	Yes
Contractors With Noncommercial Item Contracts	Yes, with Contracts Containing FAR 52.203-13	Yes, with Contracts Containing FAR 52.203-13	Yes, with Contracts Containing FAR 52.203-13	Yes
Small Business Contractors	Yes, with Contracts Containing FAR 52.203-13	Not Required but Recommended by the FAR	Not Required but Recommended by the FAR	Yes
Contracts Being Performed Wholly Overseas	Yes, with Contracts Containing FAR 52.203-13	Yes, with Contracts Containing FAR 52.203-13	Yes, with Contracts Containing FAR 52.203-13	Yes
Subcontractors	Yes, with Contracts Containing FAR 52.203-13	Yes, with Contracts Containing FAR 52.203-13	Yes, with Contracts Containing FAR 52.203-13	Yes

Why Small Business Might Want to Think/Act “Big”

The Equalizers

Disclosure Obligation ("Equalizer # 1")

- Applicable to both SB and LB and is ***independent*** of FAR 52.203-13
- Requires timely disclosure to the Agency IG of ***credible evidence*** that it ***or*** an agent or ***subcontractor*** has committed a violation of federal criminal law (fraud, COI, bribery, gratuity/kickback, FCA or overpayments.)
- Failure to disclose can result in suspension/ debarment

Due Diligence Obligation/ “Liability Protection”/ “CoC”- Responsibility Determination

(“Equalizer # 2”)

SBA Certificate of Competency/ CO's Responsibility Determination

- FAR 9.104 – 1(d) & (g), require that the CO determine that the contractor has a satisfactory record of integrity and business ethics, and that its "otherwise" eligible under applicable law and **regulation.**
- Likewise, the Prime is responsible to make the same determination as to its subs.
- In a COC context, the SBA will need to do the same.

Due Diligence

- Large and Small business, alike, are required to assure that their subcontractors are “responsible”.
- Moreover, it makes sense from a risk mitigation standpoint alone, to do so.
- If, the sub cannot demonstrate a commitment to and effective implementation of a C & E Program, should you do business with them?

Liability Protection

- In a worst case scenario, like a government investigation/litigation/prosecution, being able to demonstrate that you have implemented an effective C&E Program, can only help you defend allegations of impropriety.

The cost could be viewed as an "insurance premium"

Other Considerations

1. Will I be a more attractive candidate for a Teaming and/or Mentor Protege relationship, if I've implemented an effective C & E Program?

2. If my SB is a Prime, on a set aside, won't the government look closely at my Program to assure I have the systems in place to assure the integrity of my and my subcontractors' submissions (claims/REA's)/ performance?

C and E "Check Up" Questions

- Do we have a written C & E Code?
- Do we provide appropriate training/education?
- Is there an anonymous reporting "hot line"?
- Have we designated a Sr. Officer to oversee the Program and investigate allegations?
- Does HR do background checks to assure we're vetting principals in the company?
- Do we ask our Subcontractors/Team Partners to demonstrate compliance?
- Do we periodically review the effectiveness of our program and assess the risk of criminal conduct?

Reality

Although, not required, it appears that the default standard of responsibility will require a SB contractor to demonstrate that it has implemented an “effective” C & E Program.

Discussion and Q & A